DATE: January 27, 1998
CASE NO. 96-INA-381

In the Matter of:

SASAN, INC.
(d/b/a MR. JIFFY)
Employer

On Behalf of:

ANAHID BABAKHANI
Alien

APPEARANCE: Ara Aroustamian, Esq.
For the Employer

Before: Holmes, Jarvis, and Vittone
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for labor certification. The certification of aliens for permanent employment is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

On March 8, 1995, Sasan, Inc., d/b/a Mr. Jiffy ("Employer") filed an application for labor certification to enable Anahid Babakhani ("Alien") to fill the position of "Cook," which was classified by the Job Service as "Cook, Specialty, Foreign." The job duties for the position, as stated on the application, are as follows:

> Cook Italian specialty pastas, chicken and seafood dinners, prepare an assortment of pizzas, burgers and Middle Eastern Kebabs. Must also prepare salads, desserts and side orders. Prepare list of produce and supplies needed for purchase on a daily basis. Must prepare and create a daily special for lunch. Must make dough for pizza fresh on a daily basis.

(AF 20). The only stated job requirement for the position is three years of experience in the job offered (AF 20).

In a Notice of Findings ("NOF") issued on November 21, 1995, the CO proposed to deny certification on the grounds, inter alia, that the Employer had rejected a qualified U.S. applicant for other than lawful job-related reasons, and failed to show that the job opportunity is clearly open to qualified U.S. workers. See 20 C.F.R. §656.21(b)(6) and §656.20(c)(8). (AF 15-18).

The Employer submitted its rebuttal on or about December 26, 1995 (AF 12-13). The CO found the rebuttal unpersuasive regarding the above stated grounds and issued a Final Determination on January 19, 1996, denying certification (AF 10-11).

On or about February 23, 1996, the Employer requested a review of the final determination (AF 1-9). Subsequently, the CO forwarded this matter to the Board of Alien Labor Certification Appeals for review. Employer's appeal brief has also been received and considered.

Discussion

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. §656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. §656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications.

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such good faith requirement is implicit. H.C. LaMarche Enterprises, Inc., 87-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their

applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. §656.1.

In the present case, the CO determined that the Employer, through its actions, effectively rejected Guillermo Gomez, a qualified U.S. applicant (AF 17-18,11).

In the report of recruitment results, dated August 17, 1995, the Employer stated that it had evaluated two U.S. applicants, but that neither responded to messages left on their respective answering machines. Accordingly, the Employer assumed the U.S. applicants were no longer interested in the position (AF 42-43).

In the Notice of Findings, the CO stated that at least one of the U.S. applicants, namely, Guillermo Gomez, appears to meet the minimum requirements for the job (AF 17). In fact, the Employer had acknowledged, that "from the face of Mr. Gomez's resume, it seemed that he had somewhat the requisite experience." (AF 43). The CO questioned Employer's recruitment effort, stating that the Employer had represented that it had left three messages on Mr. Gomez's answering machine, but that the Employer had never tried an alternative method of contact, such as mailing a letter by certified return receipt , despite the fact that the applicant's address was provided to the Employer (AF 17-18). Furthermore, as noted by the CO, in response to a follow-up questionnaire, dated September 13, 1995, Mr. Gomez had stated he was "still waiting for somebody to interview me or contact me...Still waiting for an opportunity." (AF 33, 18). Finally, the CO noted that when he contacted Mr. Gomez by telephone on November 21, 1995, the U.S. applicant stated: "he has never been contacted by the employer and that he does not have an answering machine." (AF 18).

The CO advised that, in order to cure the foregoing deficiencies, the Employer must explain, with specificity, the lawful, job-related reasons for rejecting the U.S. applicant; document that the job opportunity is clearly open to any qualified U.S. worker; and, document that it had engaged in good faith recruitment (AF 18).

The Employer's rebuttal consists of an explanatory letter, dated December 26, 1995, signed by its attorney, Ara Aroustamian (AF 12-13). In pertinent part, Mr. Aroustamian stated:

> ...Mr. Guillermo Gomez was contacted by the Employer on three separate occasions at two the (sic) numbers given on his Resume. On each occasion, Mr. Gomez was not available and the Employer left a detailed message for Mr. Gomez on Mr. Gomez's answering machines. Upon receipt of your said letter, this office rang the two numbers and both contrary to your contentions, had answering machines...
>
> An Employer is obligated to only take reasonable measures to contact the prospective employees. It is true that one could attempt making contact with prospective employees by mail. However, when telephone numbers are available and answering machines are installed to take messages, it is reasonable to expect

the Employer's reliance on such method of communication...

> The Applicant was, only technically, rejected due to job-related reasons. The Employer made several attempts to contact Mr. Gomez and set an interview date. The interview was absolutely necessary even though the Employer determined that, on its face, the Resume indicated possible qualification...The interview was and is an integral part of the hiring process. Employer attempted to engage in good faith recruitment. The applicant simply did not respond.

(AF 12-13).

In the Final Determination, the CO found the Employer's rebuttal inadequate. We agree. Even if we assume that the U.S. applicant did have answering machines, and the Employer did, in fact, leave three messages, it is well settled that the Employer is obligated to try an alternative means of contacting a seemingly qualified U.S. applicant, such as by mail. *See, e.g.*, Northeastern Lumber and Millwork, 94-INA-105 (Feb. 13, 1995); Jerry's Bagel, 93-INA-461 (June 13, 1994); Gertrude Griboff, 93-INA-462 (June 13, 1994); L.G. Manufacturing, Inc., 90-INA-586 (Feb. 5, 1992). Therefore, we find that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.